

Presbyterian University Hospital d/b/a University of Pittsburgh Medical Center and International Union, United Plant Guard Workers of America (UPGWA), and its Local 502. Case 6-CA-27252

April 16, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On February 9, 1996, Administrative Law Judge Peter E. Donnelly issued the attached decision. The General Counsel filed exceptions and supporting brief, and the Respondent filed an answering brief.

On September 6, 1996, the Board issued an unpublished Order remanding the proceeding to Judge Donnelly.

On December 31, 1996, Judge Donnelly issued the attached supplemental decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision, the supplemental decision, and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

¹ In his supplemental decision, the judge found that the Respondent did not violate Sec. 8(a)(1) and (3) of the Act by denying a special recognition bonus to employee Martin Wetmore. Although we affirm the judge's recommendation that the complaint be dismissed, we do so solely on the basis that it cannot be inferred from the credited testimony of Investigations Manager George Error or Wetmore that Error's reference to "things that happened years ago," or the complaints Wetmore allegedly made 6 or 7 years ago "to somebody about something" were a reference to Wetmore's past union activity.

Suzanne C. McGinnis, Esq., for the General Counsel.
Joel E. Cohen, Esq., of New York, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

PETER E. DONNELLY, Administrative Law Judge. On charges filed by International Union, United Plant Guard Workers of America (UPGWA), and its Local 502 (the Union or Charging Party) against Presbyterian University Hospital d/b/a University of Pittsburgh Medical Center (the Employer or Respondent), a complaint and notice of hearing issued on July 5, 1995, alleging that the Respondent denied a special recognition bonus to plant guard employee Martin Wetmore. An answer was timely filed by the Respondent, and a hearing was held before me on October 24, 1995, in Pittsburgh, Pennsylvania. Pursuant to revised Section 102.42

of the Board's Rules and Regulations, oral argument was heard by me in lieu of briefs.

FINDINGS OF FACT

I. EMPLOYER'S BUSINESS

The Employer is a nonprofit corporation with offices and facilities in Pittsburgh, Pennsylvania, where it is engaged in the operation of an acute care hospital providing medical care. During the 12-month period ending March 31, 1995, Respondent, in the conduct of its business operations, derived gross revenues in excess of \$250,000 and also purchased and received at its Pittsburgh, Pennsylvania facilities goods valued in excess of \$50,000 directly from points outside the Commonwealth of Pennsylvania. The complaint alleges, the answer admits, and I find that the Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

By the background, it appears that after an organizational effort the Union won an election by a vote of 22 to 3 and was certified for a unit of security guards at Respondent's Pittsburgh, Pennsylvania hospital in 1989. However, the Respondent declined to bargain with the unit in a test of that certification until, on petition by the Board, it was ordered to do so by the U.S. Circuit Court of Appeals for the Third Circuit on May 29, 1991.¹

Wetmore, the alleged discriminatee here, testified that he was active in the Union's organizational effort, wearing a union hat and pin, and that in April 1991 he was elected as shift representative for the third shift (3 to 11 p.m.).² Wetmore also testified that after the Union's certification, he and a security officer named Tim Vincent met with the security director at that time, Patrick Laffy, concerning problems Vincent was having with excessive late and sicktime. Wetmore also testified that he attended, "at the most," 5 to 10 bargaining sessions for a contract after the certification, either as an observer or as a substitute for the shop steward, and that he substituted for the shop steward about two or three sessions.

George Error became director of security for the Respondent more than 3 years later on September 15, 1994. Error testified that he attended a couple of contract negotiating sessions after that, but that none of these sessions was attended by Wetmore. Further, that until the allegations contained here were raised, he was not aware that Wetmore held any office in the Union.

¹ Since that time, negotiations for a contract have taken place but, as of the date of this hearing, no contract has been negotiated.

² The Respondent was advised by letter dated April 28, 1991, that the union officers had been elected, i.e., chief steward, Gregory Winter; assistant steward, Robert Charles; and shift representatives, Earl Cummings (7 a.m. to 3 p.m.) and Martin Wetmore (3 to 11 p.m.).

Turning now to the crux of the matter, it appears that the Respondent has three ranges within its pay grades—a minimum, a medium, and a maximum. Employees, including security officers, were given annual evaluations which formed the basis for any merit raises they might be awarded. Once an employee had reached his maximum by way of merit raises, there was no way to increase that employee's compensation except by being awarded a special recognition bonus. These were awarded up to a maximum of about 2 percent of the employee's annual salary. Error testified that such special recognition bonuses were discretionary with him as director of the department and were awarded for work performed "over and above" what is normally required of the employee.³

In February 1995, Wetmore received a performance evaluation covering the preceding year. The evaluation was made up by Michael Paden, security manager, who had been Wetmore's supervisor for about 10 of the 12 months, being evaluated until he moved to the position of security manager on the night shift (11 p.m. to 7 a.m.) when J. T. Wright took over as security manager for the 3 to 11 p.m. shift. The performance evaluation was signed by Paden and by Error.

Error testified that on receiving the performance evaluation from Paden he reviewed it with Donald Charley, his predecessor as director of security, who had moved to a position as a director of parking. They discussed and agreed on the evaluation. According to Error, while the evaluation as to some standards were "above standard,"⁴ the evaluation did not justify awarding a special recognition bonus.⁵

About the second week of February, Wright gave Wetmore his annual evaluation and they discussed it. Wright told him that it was a very good evaluation but that he would not be getting a special recognition bonus and that he did not know why, but that the decision not to pay a bonus was up to Error or higher authority.⁶

About a week later, Error and Wetmore met in Error's office. Wetmore complained that despite a good evaluation, he was not receiving a special recognition bonus. According to Wetmore, Error explained that he was already at the maximum and, further, that he was not satisfied that Wetmore was showing the proper attitude in the performance of his work.

Error testified that he explained to Wetmore that the evaluation was arrived at with input from Paden, Charley, and himself. Further, that it was his impression that Wetmore was not happy with his work and seemed to lack enthusiasm and motivation.

He went on to explain that a special recognition bonus was intended to recognize extra work over and above his duties as an officer and that Wetmore did not qualify by those standards. He noted that certain charitable work done by Wetmore did not, for the most part, benefit the hospital.

After meeting with Error, Wetmore asked Shop Steward George Winter to file a written grievance and requested a meeting with Director of Human Resources David Treece to discuss the matter. Once again, Wetmore complained that he felt that his evaluation warranted a special recognition bonus. Treece agreed to review his evaluation and get back to him. After about 4 weeks, Treece responded that he agreed with Error and that further recourse would not be available since he did not regard his complaint as a grievable matter.

It appears that while Wetmore was not awarded a special recognition bonus, two other officers did receive one. These were Ronald Wetmore, brother to Marty Wetmore, and James Raber. Neither, according to Wetmore, were active union supporters.

Error testified that both Ronald Wetmore and Raber were given special recognition bonuses based on contributions beyond their normal duties. As to Ronald Wetmore, the bonus was based on what Error viewed as the excellent work performed by him at the "high profile" post 5 on the day shift. Post 5 is the main patient and visitor entrance to the hospital and Wetmore had to deal with stressful situations involving individuals entering the hospital as patients and visitors. It appears that Wetmore was also responsible for operations at the helicopter pad where emergency patients arrived and also for monitoring the main lobby.⁷

Raber's bonus was based on the fact that in addition to his regular duties, he compiled and prepared statistical reports for the safety committee, ultimately reviewed by the board of directors, dealing with security incidents such as thefts and accidents.

Apart from Marty Wetmore, it appears that Robert Charles, another union officer, had also reached his maximum and was not considered for a bonus in 1995 because of an altercation with another officer. Winter did not receive a bonus since he was not yet at the maximum; however, he did receive a merit raise. Nor apparently did officer Mark Zablonksi receive a special recognition award, although he was at his maximum.

The record also discloses that during the review period, Wetmore received commendations for perfect attendance; jump-starting cars during a snowstorm; and, along with several others, assisting the Respondent's assistant director, news bureau, in "controlling the media" after a shooting at the hospital. Error acknowledged these commendations but testified that overall, Wetmore's performance did not warrant a special recognition bonus.

B. Analysis and Conclusions

Insofar as this record discloses, Wetmore's organizing activity in 1989 on behalf of the Union consisted of wearing items displaying the union logo and, in 1991, becoming the shift representative for his shift. Although Wetmore attended some bargaining sessions after the Union's certification in 1991, nothing in the record suggests that Error, the alleged

³ Error testified that the special recognition bonus policy was discontinued in July 1995.

⁴ Wetmore was rated "above standard" for 11 standards and "meets standard" for 17 standards.

⁵ Wetmore testified that he had been previously denied a special recognition bonus in February 1994 by Charley, based on a "below standard" rating as to a single standard.

⁶ Wetmore's hourly rate at this time was \$12.60 per hour. This exceeded the maximum hourly rate which was \$11.89 due to a shift differential of 55 cents per hour and a special recognition bonus previously granted to Wright sometime prior to 1989. Wright has been at the maximum for about 10 years and has received two special recognition bonuses, both prior to 1989. Wright has not been awarded a bonus since then. However, he has never before claimed that his union sentiments or activities had anything to do with his failure to receive a bonus.

⁷ At times, Marty Wetmore also worked the post 5 on his shift for up to 2 or 3 hours.

perpetrator of the discrimination here, was aware either that Wetmore held union office or had attended any bargaining sessions. It is the contention of the General Counsel, however, that it was Wetmore's activity or sentiments on behalf of the Union that precipitated the denial of a bonus.

To begin with, special recognition bonuses are discretionary. As to security officers, they were awarded at the discretion of the security director for outstanding work above and beyond normal duties. This is not in dispute and, so long as it was not discriminatorily denied, it would have been lawful to deny bonuses to those who had reached their salary maximums.

However, the Respondent could have exercised that discretion based on unlawful considerations; in this case, Wetmore's union sentiments and activity. However, having carefully reviewed this record, I cannot conclude that the Respondent unlawfully exercised its discretion in denying a special recognition bonus to Wetmore.

First, in examining Wetmore's wage history, we see that he had been at the maximum for 10 years and in that time had received two bonuses; none since the advent of the Union in 1989. So it is apparent that bonuses were not granted routinely to those having their reached their salary maximums, even prior to the Union's arrival. However, this record discloses that Wetmore has never asserted, except in connection with the 1995 evaluation, that the denial of bonuses in the years since 1989 has been motivated by his union sentiments or activity.

The General Counsel puts great emphasis on the contention that bonuses were granted in 1995 to less active union members Ronald Wetmore and Raber while being denied to Martin Wetmore. Without detailing the evidentiary support recited above and in greater detail in the record, it appears to me that the rationale offered by Respondent in awarding bonuses to Ronald Wetmore and Raber was reasonable, and the record is simply insufficient to warrant the conclusion that the criteria for awarding bonuses was applied in a discriminatory manner with respect to Martin Wetmore.

Robert Charles received two bonuses since reaching his maximum in 1992, despite the fact that he had been the assistant steward since 1991. As noted above, Charles was not considered for a bonus in 1995 because of an altercation with another officer. Winter, the Union's chief shop steward, is not eligible for a bonus since he has not reached his salary maximum, but he did receive a merit increase and has received merit increases annually beginning in 1990.

Nor do I conclude, as the General Counsel contends, that the commendations in his personnel file, as noted above, mandate the conclusion that his work performance was so outstanding that union animus must be inferred as a motivating factor in the denial of a bonus.

In short, I conclude that the General Counsel has failed to sustain his burden of establishing that Wetmore was denied a special recognition bonus in February 1995 because of his union sentiment or activity and, accordingly, I shall recommend that the complaint here be dismissed.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be

ORDER

The complaint is dismissed in its entirety.

adopted by the Board and all objections to them shall be deemed waived for all purposes.

Suzanne C. McGinnis, Esq., for the General Counsel.
Joel E. Cohen, Esq., of New York, New York, for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

PETER E. DONNELLY, Administrative Law Judge. By Order dated September 6, 1996, the Board remanded this case to me to make "a credibility resolution concerning testimony about what was stated by [Director of Security] George Error at [alleged discriminatee Martin] Wetmore's evaluation review meeting as to why Wetmore was denied a special recognition bonus and for further consideration in light of that credibility resolution."¹

Since the Board failed to indicate in its remand what parts of the two versions of the conversation are in conflict, it is apparently left to me to decide what portions of the testimony of the two participants are in conflict, if any, and then to resolve any conflicts.

Facts

The Evaluation Review Conversation

Wetmore testified that he expressed concern to Error that he had received a good evaluation but was not getting a merit bonus. According to Wetmore, he was told by Error that there were two reasons for that decision, the first being that he was already at the maximum pay rate and the second his "bitterness and attitude." As to being at the maximum, Wetmore responded that a merit bonus was the only way he could get a raise, and that as to his bitterness and attitude, he had never been counseled about it, even by Error.

Wetmore went on to testify that Error told him, apparently by way of example, that "about six or seven years ago that he was walking through the old Presby Administration Building and he heard me complaining to somebody about something. I don't recall the specific incident. And—and I told, I said, 'Even if I were complaining, that has nothing to do with my evaluation today.' He didn't say anything after that."

Wetmore further testified as follows:

Q. [By Ms. McGinnis]: On these reasons that you were given for not getting a bonus, first I want to address the reason that six or seven years ago you were heard complaining. Now what, if anything, was happening at work six to seven years before February of 1995?

A. The union was—we were holding meetings. The union was going to be organized. There was a union drive.

¹ In fn. 3 of the Board's Order remanding, the Board inadvertently referred to Error as the "Manager of Security." He was actually employed in the security department as "Investigations Manager," reporting to the director of security. I correct the Board's error.

Later, in his testimony, another exchange took place as follows:

Q. [By Ms. McGinnis]: Now, in the time period 1989, can you recall making any complaints about work as Mr. Error referred to? Do you know what he was referring to when he told you, you made complaints six or seven years ago.

A. I have no idea, I can't—I told him I couldn't even recall the incident.

Q. Okay, and then—

JUDGE DONNELLY: Well, wait a minute, didn't—

THE WITNESS: He said I had complained.

JUDGE DONNELLY: —you say, bitterness and attitude?

THE WITNESS: Well, that was—he said my bitterness and attitude and then he brought up the—when—the part about he said he was going through the old Presby administration building at that time and he heard me complaining to somebody about something.

JUDGE DONNELLY: Uh-huh.

THE WITNESS: I don't recall the incident. I'm not saying it didn't happen. I'm just saying I don't recall the incident and even if it did happen, it would have no bearing on my evaluation today.

JUDGE DONNELLY: Is that what you said?

THE WITNESS: Yes, sir.

Wetmore further testified that Error mentioned Presbyterian care team classes which were being formed to deal with employee attitudes and working with patients and that attendance would be mandatory for all employees, including the security department.

Error, for his part, testified that he told Wetmore he was aware he was unhappy with his evaluation and offered to discuss it. He told Wetmore that the evaluation was the result of input from several managers. Error explained that a merit bonus required performance over and above his duties as an officer and that Wetmore did not qualify. He asked Wetmore if he felt that his performance was better than the other officers, and Wetmore replied that he did not.² They discussed some of Wetmore's extracurricular contributions and Error dismissed them as insufficient to warrant a merit bonus. Error told Wetmore that the evaluation included how Wetmore projected himself as an officer and how he represented the department and told him:

I told him, I says, "This is off the record." I says, "but Marty, I don't think you're happy here. Why?" I said "If its things that happened years ago," I said "You know you shouldn't carry that on your shoulder." I says "You know it's time to"—I says, "I couldn't come to a job and not be happy every day or at least half of the week, but to come to work and be unhappy every day, you know, is—is tough. And you should, you know, look into that."

² Wetmore concedes saying that he felt he was as good as, but not better than anyone in the department.

Error also mentioned the hospital care teams which were being established to promote motivation, attitude, and enthusiasm.

In comparing the two versions of this conversation, there appears to be, despite the remand, little conflict as to those portions with any significant relevance to the disposition of this case.

In this regard, I conclude, as set out above, that both alluded generally to incidents or "things" having taken place several years ago. Wetmore testified that Error said he heard Wetmore complaining to someone about something. Error testified that he told Wetmore he should not carryover things that happened years ago. Both gave credible accounts. Their testimony is not mutually exclusive and does not require credibility resolutions.

Apparently the General Counsel is contending that these allusions by Error to events several years ago refer to Wetmore's union activity in 1989 and provide a basis for inferring unlawful motivation. I do not agree.

Even crediting, as I do, the testimony of both Wetmore and Error, I cannot, based on those accounts, conclude either that Error was referring to Wetmore's union activity, or even assuming that he was, that such reference constitutes a sufficient basis to infer discriminatory treatment, particularly in view of the other factors recited in my original decision which support a different result. This is particularly true in view of Error's un rebutted testimony, as set out in my original decision, that while he knew that all the guards supported the Union, he was not aware of any particular union activity by Wetmore until after the charges in the instant case were filed.

Further, even assuming that Error was alluding to union activity, to accept the General Counsel's position, it would be necessary to conclude that Error, formerly the Respondent's director of investigations at the time of the organizational effort in 1989, retaliated against Wetmore for union activity engaged in by Wetmore during the Union's organizational effort in the summer of 1989. In the circumstances of this case, that conclusion is not warranted.

In summary, I conclude that the evidence adduced by the General Counsel to support the allegation that Wetmore was denied a merit bonus because of his support or activity on behalf of the Union is insufficient to support the allegation.

CONCLUSION OF LAW

The Respondent has not engaged in any conduct violative of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The complaint is dismissed in its entirety.

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.